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# In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 331

ROY JONES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Appeals (R. 59–63) is reported at 245 F. 2d 32.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1957 (R. 64), and a petition for rehearing was denied on July 3, 1957 (R. 68). The petition for a writ of certiorari was filed on July 31, 1957, and granted on October 14, 1957 (R. 70; 355 U. S. 810). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

### QUESTION PRESENTED

Whether the seizure of contraband was reasonable where federal agents, having probable cause to arrest

petitioner and reasonably believing that he was inside his house, entered and found contraband in plain view.

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment and the statutes involved are set out in the Appendix, *infra*, pp. 25–31.

## STATEMENT

A four-count indictment filed in the District Court for the Northern District of Georgia charged petitioner and two other defendants with violating the laws relating to liquor (R. 1–2). The petitioner was tried by the court without a jury (R. 55) and found guilty as charged (R. 56). He was sentenced to three years imprisonment, plus a $100 fine on the first count, and fined $500 on the second count (R. 57). On appeal, the conviction was affirmed (R. 59–63).

1. On April 30, 1956, having received information that petitioner was operating an illegal distillery in his farm house near Dawsonville, Georgia (R. 12, 22), federal alcohol agents went to the farm to investigate (R. 22, 41). In a hollow behind petitioner's house, an agent found spent mash—which has a characteristic appearance—running out of a rubber hose into a stream (R. 17, 24, 41–42). One of agents testified he knew of no way to produce spent mash except by distilling the alcohol out of mash (R. 43). The officer traced the partially buried hose to within about 50 yards of petitioner's house—as far as he dared go without risk of being seen (R. 17–18, 24).

Four federal agents and one state officer returned to the vicinity of petitioner's house the following day

(May 1). The hose was still in place and delivering mash into the stream (R. 18–19, 42, 45). It led toward petitioner's house and there were no other houses near the hose (R. 19). The agents kept watch until the early morning hours of May 2, 1956 (R. 20, 43). They could hear voices and the sound of a blower burner operating in the house, and smelled mash cooking. Occasionally people could be seen moving around inside the house (R. 20, 29, 37, 43). Heat is used during the course of distilling alcohol out of mash (R. 45), and blower burners are quite commonly used as a source of heat in the operation of illegal distilleries in Dawson County, Georgia. Blower burners are not commonly used for any other purpose in that area (R. 21).

On May 2, 1956, federal agent Langford obtained a daytime search warrant for petitioner's house (R. 4–5). The group of investigators then returned to the vicinity of the house, arriving there in the late afternoon about a half hour before dark (R. 33, 38, 43). They decided to make further observations and learn whether other parties were involved and whether any vehicles were being used, rather than execute the warrant at that time (R. 47–48). While concealed in a wooded area across the road from the house (R. 32–33, 29), they heard someone at petitioner's residence say, "Do you want to bring the truck?" (R. 44). Then a person left the yard and walked up the road toward the home of petitioner's father and brother, located a short distance away (R. 7, 43–44). Soon a truck was driven into petitioner's yard and around to the back of the house, out of the agents' sight (R. 29,

44). Sometime later, through the window, the agents saw people moving about in the house and heard noises as though heavy pieces of equipment were being moved (R. 20, 30, 44).

At about 9:15 p. m., the truck was driven around from the rear of the house and the agents started to close in (R. 20, 30, 44). As the truck attempted to pull onto the public road in front of petitioner's house, it became stuck in the driveway (R. 30, 44). Federal agent Evans climbed into the cab of the truck and arrested James McKinney, the driver (R. 30). Grady Jones, who was on the back of the truck, was arrested by federal agent Blizzard (R. 11, 14, 20, 30). It turned out that 413 gallons of nontaxpaid liquor was loaded on the truck (R. 21, 30, 62). Meanwhile, state revenue agent Hollingsworth went to the front porch, where he found petitioner's wife and twelve-year-old son,[1] and federal agent Langford, followed by Evans, went to the rear door (R. 37, 44, 54). The boy picked up a shotgun and started through the house from front to back. Hollingsworth called out a warning to Langford and Evans, and asked Mrs. Jones to "Make the boy put the gun down." She refused. The boy returned to the front of the house, and Langford joined the group on the porch. Hollingsworth repeatedly asked the boy to hand over the gun, but without success. After a few minutes, the boy came close enough so that Hollingsworth, who had been standing

[1] As the agents advanced on the truck, a car coming from the direction of Dawsonville, Georgia, had driven into petitioner's yard through a second driveway. Mrs. Roy Jones arrived at the porch a step or two ahead of Hollingsworth (R. 8, 30, 37).

in the doorway, "could get to the gun" and disarm the boy (R. 37–38, 44).[2]

Agents Langford and Evans entered the house through the front door over the protests of Mrs. Jones (R. 31, 44).[3] They found petitioner's father, Frank Jones, and his brother, Millard Jones, but did not find petitioner, in the house (R. 7–8, 10).[4] They also discovered, in one of the rear rooms, an upright boiler, an electric motor with a blower attached, and several fifty-five gallon metal drums (R. 31, 44). A stairway led up into the attic from this room. Langford went up the stairs to the attic and observed a still, wood barrels filled with mash, metal tank type fermenters, a slop barrel, and a mash pump (R. 15, 44–45). Then Langford went back downstairs, asked Mrs. Jones to calm down, and took up the wait for petitioner (R. 44–45).

[2] The district court found as a fact that "the first entry into the residence was made by state agent Hollingsworth to secure the shotgun and take it away from the child" (R. 62).

[3] Frank Jones, petitioner's father, testified that Mrs. Roy Jones attempted to bar entry to the house, asked to be shown a warrant, and asked the agents to wait until petitioner returned home. According to this witness, the officers pushed Mrs. Jones out of their way (R. 8–9). In addition, petitioner includes testimony from Mrs. Jones in the appendix to his brief (pp. 18–21) which is to the same effect. However, the agents denied that they had used force to gain entry (R. 31) except that state agent Hollingsworth may have unintentionally bumped either Mrs. Jones or her son in seizing the shotgun (R. 38).

[4] The record is silent as to whether or not Frank and Millard were arrested. We have ascertained, however, that no arrests were made in the house.

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Petitioner arrived home at about 10:00 p. m. to find Grady Jones and McKinney under arrest and the group of agents waiting for him on the front porch (R. 12–14, 50). He claimed ownership of the distillery but denied that the whiskey found in the truck had come from his still (R. 15–16, 50). After talking to petitioner, the agents pumped out most of the mash and destroyed those parts of the still which they did not take with them (R. 14).

At the time of the entry into the house, agent Langford, who was in charge of the investigation (R. 40), assumed that he had probable cause to arrest anyone emerging from the premises who was known to have violated an internal revenue law. On cross-examination he testified (R. 49):

> Q. You would not have had a right? You would not have had a right, you would not have been able to have arrested anyone coming out of those premises?
>
> A. Had not I known there that they had violated some Internal Revenue law.
>
> Q. In other words, you didn't assume at that time that you even had probable cause?
>
> A. I did assume.
>
> Q. You did assume that?
>
> A. Yes.

He also believed that the agents had sufficient evidence to enter the premises without a search warrant (R. 51).

2. On October 8, 1956, petitioner moved to suppress as evidence and have returned to him the boiler, burner, and about fifteen barrels seized by the agents in his home (R. 3). He did not move to suppress

the mash which was in the barrels (R. 3, 15). After hearing extensive testimony the district court denied the motion, holding that (R. 55):

> * * * the officers had reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that Roy Jones was guilty of the offense of operating an illicit distillery in his home and this is true even though the officers had time to obtain a nighttime search warrant.

The Court of Appeals affirmed *per curiam*, attaching the district court's findings and conclusions as an appendix to its opinion (R. 59–63).

## SUMMARY OF ARGUMENT

At no time has the Government claimed that the entry into petitioner's home at about 9:15 p. m. could be justified under the daytime search warrant. Nor have we contended that an entry may be made merely to search in the belief that offending articles are inside a building. Rather, we think the evidence here was admissible because contraband was discovered after a lawful entry for the purpose of arresting petitioner on probable cause to believe that there were in the house persons then engaged in the commission of a felony and that petitioner was among such persons.

A. Agents of the Alcohol Tax Unit of the Internal Revenue Service are peace officers of the United States with power to make arrests for liquor offenses. They have the powers of United States Marshals, including the power under federal law to arrest without

a warrant on probable cause to believe that an offense has been or is being committed.

B. At the time the federal agents entered petitioner's house, they had ample cause to believe that there were persons inside the house who were subject to arrest, and that petitioner was one of them. The agents had made observations over a period of two days prior to the date of entry. They had smelled cooking mash, had seen the discharge of spent mash into a nearby stream from a hose leading from petitioner's house, and had heard the sounds of a distillery operation. They had good cause to, and did, believe that several persons, among them petitioner, were involved in the enterprise.

At the time of the entry, the federal officers had seen and heard enough to know that a large quantity of illicit liquor was being removed from the premises. They had just arrested two persons involved in the removal and knew they had the power to arrest anyone inside the house who was participating in the operation of the still, especially petitioner. They had every reason to believe that there were several persons, including petitioner, inside the house, and that these persons had been alerted to the arrests made outside.

On this basis, it is a fair inference that the agents entered to arrest petitioner, and not to make a search. As it turned out, petitioner was not in the house, and the officers returned to the front porch to await his return after discovering the contraband, but this does not detract from the reasonableness of the belief that

he was inside, entertained by the agents at the time of entry into the house.

An officer having lawful authority to arrest without a warrant may do so even though he had sufficient information and time to get a warrant. *United States* v. *Rabinowitz,* 339 U. S. 56, 66. He may enter a house, even over protest, to make an arrest where he has probable cause to believe that a felony is being or has been committed and that the perpetrator is within the house. See *Agnello* v. *United States,* 269 U. S. 20; cf. *Taylor* v. *United States,* 286 U. S. 1, 6. Moreover, if there was reasonable cause to believe that a felon was within the house the entry was nonetheless lawful even though the officer's good faith belief later turned out to be erroneous.

C. Having made a lawful entry, the officers were entitled and obligated to seize contraband which was in open view and in which, by statute, petitioner could not have any property interest. This right of seizure did not depend upon the making of a contemporaneous arrest or upon the possession of a valid search warrant. It arose from the fact that the agents saw before them property, the very possession of which is a crime, in a place which they had lawfully entered.

There is no question but that the agents immediately recognized petitioner's still as one which, by law, was contraband and subject to forfeiture. It was located in a dwelling house, an unlawful site for a distillery, and no sign reading "registered distillery" was displayed. This Court has always recognized that where, as here, in the course of his official duties, an officer comes upon property which is contraband or

the instrumentality of a crime, he may seize the property without a warrant. *Harris* v. *United States,* 331 U. S. 145; *Zap* v. *United States,* 328 U. S. 624; *Steele* v. *United States No. 1,* 267 U. S. 498.

## ARGUMENT

At no time in this case has it been argued that the entry into petitioner's home, at about 9:15 p. m., could be justified on the basis of the daytime warrant.[5] Nor do we read the opinion of the district court, on which the Court of Appeals affirmed, as justifying the search merely on the basis of a belief that there was an illegal still in the house which would serve as evidence of a charge to be later brought. Such a ruling would be contrary to the holding of this Court in *Taylor* v. *United States,* 286 U. S. 1; see, also, *Agnello* v. *United States,* 269 U. S. 20, 33. Rather, we believe the facts of this case bring it within the exception suggested by *Taylor, supra,* 286 U. S. at 6, and subsequently developed by the lower courts, that an entry without a warrant is justified, under appropriate circumstances, in order to make an arrest or when there is reason to suppose that an arrest can be made.

### A. Federal Alcohol Tax Unit agents have the power to arrest without warrant on probable cause to believe that a felony has been committed

Agents of the Alcohol Tax Unit of the Internal Revenue Service are peace officers of the United

[5] Possession of an insufficient warrant does not render illegal an arrest which could lawfully have been made without a warrant. *United States* v. *Rabinowitz,* 339 U. S. 56, 60; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 356; *Stallings* v. *Splain,* 253 U. S. 339, 342.

States with power to make arrests. *Trupiano* v. *United States*, 334 U. S. 699, 705. They have, with respect to liquor offenses, the power to arrest without warrant when they have probable cause to believe that a felony has been committed.

Section 5313 (a) of 26 U. S. C. (Supp. IV) provides:

> The Secretary, his assistants, agents, and inspectors, and all other officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this part * * * which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

That section was said to be merely a continuation of existing law.* House Report No. 1337, 83d Cong., 2d Sess., 1954 U. S. Code Cong. and Adm. News, p. 4508;

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*Section 28 of the National Prohibition Act of October 28, 1919, c. 85, Title II, 41 Stat. 305, 316, had provided:

> The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

After repeal, Section 9 of the Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, 49 Stat. 872, 875, continued this power. Section 9, in turn, became Section 3121 (a) of the Internal Revenue Code of 1939 (26 U. S. C. (1946 ed.) 3121 (a)) and is presently 26 U. S. C. (Supp. IV) 5313 (a), quoted in the text, *supra*.

Senate Report No. 1622, 83d Cong., 2d Sess., 1954 U. S. Code Cong. and Adm. News, p. 5171. To ascertain the power of the Alcohol Tax Unit agents to arrest, one must look, therefore, to what authority Congress has elsewhere conferred upon law enforcement officials with respect to the liquor laws. The answer is found in 18 U. S. C. 3053, the only statute conferring powers to enforce the liquor laws, which authorizes United States Marshals to

> * * * make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

Thus, by virtue of Section 5313 (a) of Title 26, *supra*, the power which United States Marshals have to arrest without warrant on probable cause for any felony is conferred, with respect to the liquor laws, upon agents of the Alcohol Tax Unit.'

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'26 U. S. C. (Supp. IV) 7803 provides that the Secretary of the Treasury or his delegate may employ such persons as are necessary to enforce the internal revenue laws and issue such directions and orders to these persons as are necessary. By Treasury Decision 6091, 19 F. R. 5167, Aug. 16, 1954, regulations in force at the time of the enactment of the Internal Revenue Code of 1954 were continued in force.

By Treasury Department Order No. 150-2, 17 F. R. 4590, May 15, 1952, the Secretary delegated his powers with respect to the internal revenue laws to the Commissioner of Internal Revenue and authorized further delegation. By Commissioner's Reorganization Order No. 16, 18 F. R. 4033, July 1, 1953, the

Prior to the 1948 revision of the Criminal Code, former 18 U. S. C. (1940 ed.) 593, which was first enacted as Section 9 of the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, had provided:

> Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer * * *.

Although this section, relating specifically to the power to arrest for liquor offenses, was not continued by the 1948 revision of the Criminal Code,* since

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Commissioner delegated power to the Assistant Regional Commissioner, Alcohol and Tobacco Tax, to enforce all internal revenue laws relating to liquor, including authority to apprehend violators of such laws. By Commissioner Delegation Order No. 31, April 30, 1956, power to enforce the liquor laws was delegated to the Director, Alcohol and Tobacco Tax Division. This Order provided in pertinent part:

> "1. There is hereby delegated to the Assistant Commissioner, Operations, and the Director, Alcohol and Tobacco Tax Division, the authority—
>
> (a) to administer and enforce:
>
> (1) Chapters 51, 52 and 53 of the Internal Revenue Code relating, respectively, to distilled spirits, wines, and beer, tobacco, and firearms, including the authority to supervise and regulate the liquor and tobacco industries, * * *" .

Sections 7213.2 (2) and 7268 (1), Part VII, Enforcement, Alcohol and Tobacco Tax, Internal Revenue Manual, authorize enforcement personnel of the Alcohol and Tobacco Tax Division to arrest violators.

*See 62 Stat. 863; see, also, Notes of Advisory Committee on Rules, Rule 5 (a), Federal Rules of Criminal Procedure.

marshals had been given power since 1935 to arrest without warrant for all offenses,[9] agents of the Alcohol Tax Unit continue, under 26 U. S. C. (Supp. IV) 5313 (a), *supra,* to have the power of marshals as to liquor offenses.

The power of federal agents to arrest under federal law was recognized by this Court in a case arising before 1948. In *Brinegar* v. *United States,* 338 U. S. 160, the Court, without reference to state law,[10] upheld the power of agents without a warrant to stop and search a moving vehicle and arrest the driver. And, under the present statutes, the power which United States Marshals have generally, and which Alcohol Tax Unit agents therefore have as to liquor offenses, includes the power to arrest without a warrant on probable cause to believe that a felony has been committed.[11]

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[9] Section 2 of the Act of June 15, 1935, c. 259, 49 Stat. 377, 378 (now 18 U. S. C. 3053), *supra,* p. 12.

[10] This was after the Court had held in *United States* v. *Di Re,* 332 U. S. 581, that, where no federal law specified the right to arrest, state law would be controlling.

[11] Since there was not this background of statutory authority as to narcotics agents, their powers of arrest were not covered by federal law and were held to be governed by state law in *United States* v. *Di Re, supra.* Hence, a federal statute was deemed necessary to give them general powers to arrest without warrant irrespective of state law. 26 U. S. C. (Supp IV) 7607, added July 18, 1956.

Here, Georgia law provides (27 Code of Georgia, Sec. 207):

> An arrest for a crime may be made by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant.

Although it might be argued that the Alcohol Tax Unit

**B. At the time of entry into the house, the agents had reasonable cause to believe that there were persons in the house then and there engaged in the commission of a felony and that petitioner was among them**

Before the agents attempted to enter the house, they had ample cause to believe that there were persons inside who were subject to arrest and that petitioner was one of them. They had previously ascertained that the house was being used as a distillery. They had discovered spent mash discharging from a hose leading to petitioner's house. The next evening they knew the distillery was going full blast. They could hear the blower, which was fueling the boiler, in operation; an odor of cooking mash enveloped the area; spent mash was being discharged into the stream; voices and "bumping" noises could be heard; and people could be seen moving around the house (R. 29). Certainly, the agents knew then, if not before, that a number of people were involved in the operation.

On the following evening—that involved here—the events which the agents saw and heard gave them every reason to believe that a whole truck-load of illegally distilled liquor was then in the process of being removed from petitioner's home and that this represented the removal of the fruits of petitioner's operation. It was an event in which the operator of

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agents, having detected the odor of mash and heard the sound of the blower and of objects being moved, could arrest under state law for a felony committed in their presence (*Howell* v. *State*, 162 Ga. 14, 27, 30, 134 S. E. 59, 65, 66; *Ramsey* v. *State*, 92 Ga. 53, 63, 17 S. E. 613, 615), we believe that, for the reasons stated above, the federal agents' power to arrest is not limited by state law.

the still would have considerable interest. Accordingly, the agents had every reason to suppose that petitioner was on the premises at the time they acted to arrest the participants in the operation.

Having made two arrests outside the house, the agents still had petitioner to locate and arrest. A large quantity of liquor was on the truck and the agents could fairly believe that more than two persons had participated in loading it. It was also reasonable to conclude that the liquor had been in the house before loading. Lastly, it was reasonable to believe that petitioner was in the house since the agents had seen several people moving around inside the house before they first moved across the road. As it turned out, there were two people in the house besides the young boy—petitioner's father and brother—but the agents could not know their identity before entering and it was reasonable to suppose that one of these persons would be petitioner.[12]

It is perfectly clear that the agents knew they had reasonable cause to arrest petitioner if they could only find him. They had already arrested two participants in his enterprise outside his house. Agent Langford, who was in charge of the group, expressly testified that he assumed he had probable cause to

[12] It is this factor which distinguishes this case from *Johnson* v. *United States*, 333 U. S. 10. In that case, the narcotics agents did not know who was in defendant's room when they appeared at her door. Moreover, there might have been many persons inside and the defendant might not have been present, or implicated even if present. Here, the agents knew several persons had been in the house, and it was likely that petitioner, otherwise implicated, was one of them.

arrest anyone coming out of those premises who had violated an internal revenue law, *supra*, p. 6, and petitioner was clearly such a violator.

We believe that the conclusion that the agents entered the house to arrest petitioner is one which may rationally be drawn from the facts. After entering, the officers came across the illegal distillery while looking in all the rooms. But this search for petitioner was necessary because if he had been in the house at the time the investigators made the arrests outside the house, he would have been immediately aware that a raid was in progress, and might have sought to hide.[13] Having once ascertained that petitioner was not in the house, agent Langford returned to the front porch to await his return, rather than proceeding to seize the still. It was only after petitioner's return that the seizure took place. This evidenced an intent to arrest, rather than to search, at the time of entry.

The district judge's findings seem to support this interpretation. As we have previously noted, *supra*, p. 7, he expressly concluded (R. 55) that:

[13] Petitioner's wife testified that, in seeking to bar the agents' entry into the house, she had stated that petitioner was not at home and asked the agents to await his return (Pet. Brief, App. p. 19). However, the agents, who already had ample evidence, summarized above, that the persons at the house were engaged in illegal activities, were not obliged to accept without checking the statement that petitioner was not in the house—a representation which the agents might reasonably have believed was designed merely to secure delay and facilitate petitioner's escape. Cf. *Love* v. *United States*, 170 F. 2d 32, 33, certiorari denied, 336 U. S. 912, dismissed *infra*, p. 20.

> * * * the officers had reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that Roy Jones was guilty of the offense of operating an illicit distillery in his home and this is true even though the officers had time to obtain a nighttime search warrant.

This we take to be a conclusion that the officers reasonably believed, on sufficient grounds, that petitioner was then and there engaged in committing a felony.

The law is clear that an officer having lawful authority to arrest without a warrant may do so even though he had previously had sufficient information and time to get a warrant. *United States* v. *Rabinowitz,* 339 U. S. 56, 66. At the time of the adoption of the Constitution and ever since, except when the rule has been changed by statute, it has been established law, in England and in the federal and state courts, that a peace officer may arrest on reasonable cause to believe that a felony has been committed and that the person arrested has committed it. 2 Hale, *Pleas of the Crown* (1847), pp. 84–97; 4 Blackstone, *Commentaries* (1900), 290–295; 2 Hawkins, *Pleas of the Crown* (1787), pp. 128–130; Wilgus, *Arrest Without a Warrant,* 22 Mich. L. Rev. 541, 673, particularly at 548–550 and 685–689; *Carroll* v. *United States,* 267 U. S. 132, 156–157; *Kurtz* v. *Moffitt,* 115 U. S. 487, 504; *Rohan* v. *Sawin,* 5 Cush. (Mass.) 281, 284–285; *Wakely* v. *Hart,* 6 Binn. (Pa.) 316, 318–319; *Samuel* v. *Payne,* 1 Dougl. 359; *Beckwith* v. *Philby,* 6 B. & C. 635. As Wilgus makes clear, *op. cit, supra,* the power to arrest without a warrant preceded the development of warrant pro-

cedure and was never supplanted by the warrant procedure.

In order to effect an arrest, an officer may enter and, where necessary, break into a house either pursuant to a valid warrant [14] or where he has probable cause to believe that a felony has been committed. See *e. g., Agnello* v. *United States,* 269 U. S. 20; *Mattus* v. *United States,* 11 F. 2d 503 (C. A. 9); *Appell* v. *United States,* 29 F. 2d 279 (C. A. 5); *Mullaney* v. *United States,* 82 F. 2d 638, 641 (C. A. 9); *United States* v. *Dean,* 50 F. 2d 905, 906 (D. Mass.); *United States* v. *Chin On,* 297 F. 2d 531, 533 (D. Mass.); *Commonwealth* v. *Phelps,* 209 Mass. 396; *Argetakis* v. *State,* 24 Ariz. 599, 606; *Shanley* v. *Wells,* 71 Ill. 78, 82; *McLennon* v. *Richardson,* 81 Mass. 74, 76; *Smith* v. *Tate,* 143 Tenn. 268, 275–276; 1 Wharton's Criminal Procedure (10th ed.) § 51; Wilgus, *Arrest Without a Warrant, supra,* 22 Mich. L. Rev. 541, 798, 800–807; see *Taylor* v. *United States,* 286 U. S. 1.

Furthermore, cases such as this, where no arrest is made after entry, stand on the same footing so long as the agents had probable cause to make an arrest and had reason to believe, and did believe, that the suspected individual was in the house. The entry is nonetheless authorized and legal. *Love* v.

[14] See, *e. g., United States* v. *Faw,* Fed. Cas. No. 15,079; *Kelsy* v. *Wright,* 1 Root 83 (Conn., 1783); *State* v. *Shaw,* 1 Root 134 (Conn., 1789); *Hawkins* v. *Commonwealth,* 53 Ky. 395; *Barnard* v. *Bartlett,* 64 Mass. (10 Cush.) 501; *Commonwealth* v. *Irwin,* 83 Mass. (Allen) 587; *Commonwealth* v. *Reynolds,* 120 Mass. 190; *State* v. *Mooring,* 115 N. C. 709; *State* v. *Shook,* 224 N. C. 728, 733–734; *State* v. *Smith,* 1 N. H. 346; and cases collected in 5 A. L. R. 263.

*United States,* 170 F. 2d 32, 33 (C. A. 4), certiorari denied, 336 U. S. 912; *Paper* v. *United States,* 53 F. 2d 184, 185 (C. A. 4); *Lane* v. *United States* 148 F. 2d 816 (C. A. 5), certiorari denied, 326 U. S. 720; *Martin* v. *United States,* 183 F. 2d 439 (C. A. 4), certiorari denied, 340 U. S. 904.

In *Love* v. *United States,* 170 F. 2d 32, 33 (C. A. 4), *supra,* the agents had a warrant for the arrest of Foster and information that he was at defendant's house. Defendant denied that Foster was there but the agents entered to look for him. While inside they found a distillery in operation. The court held that the motion to suppress was properly denied for "[t]he officers were rightfully in the house * * * [citation omitted] and the discovery of the unlawful still was incidental to lawful search for Foster". And in *Paper* v. *United States,* 53 F. 2d 184, 185 (C. A. 4), *supra,* evidence was held to be admissible where officers entered the defendant's premises for the purpose of finding and arresting him and while lawfully there discovered that a crime was being committed in their presence. Similarly, see *Martin* v. *United States,* 183 F. 2d 436, 439 (C. A. 4), *supra,* where the search was upheld, the court saying, "[i]n other words, the legality of the search under these peculiar circumstances cannot be distinguished on any reasonable basis from the search of the premises of an accused as an incident to the lawful arrest of his person; * * *."

We have no quarrel with the holdings in such cases as *Accarino* v. *United States,* 179 F. 2d 456, 463 (C. A. D. C.), or *McKnight* v. *United States,* 183 F. 2d

977 (C. A. D. C.), where there was ample opportunity to arrest the defendant outside the home. Nor do we question cases such as *Gibson* v. *United States*, 149 F. 2d 381, 383 (C. A. D. C.); certiorari denied *sub nom. O'Kelly* v. *United States*, 326 U. S. 724, *Gatewood* v. *United States*, 209 F. 2d 789, 790 (C. A. D. C.), and *Nueslein* v. *District of Columbia*, 115 F. 2d 690, 693 (C. A. D. C.), where there was no probable cause to enter to make, or attempt to make, an arrest. We agree that there must always exist probable cause to arrest and probable cause to believe that the person sought is inside the house. But it does not follow from these cases that, where an immediate arrest is justified or compelled, and there is good cause to believe that the person sought is inside, the home may nevertheless not be entered. The numerous cases cited above (*supra*, pp. 19–20) show that, where there is good reason to believe that a felony is being or has just been committed by a person who either committed it in the house or is probably hiding there, the officers may properly enter the house, over protest if necessary,[15] to make, or attempt to make, an arrest; their entry is not rendered unlawful by reason of the unanticipated fact that the person whom they were seeking did not happen to be there at the time.

[15] Petitioner concedes that "the methods used by the officers [to gain entry] are not technically a legal ground for the suppression of the evidence". Pet. Brief p. 6, footnote. Cf. *Batrientes* v. *United States*, 235 F. 2d 116 (C. A. 5), certiorari denied, 352 U. S. 879; *People* v. *Maddox*, 46 Cal. 2d 301, certiorari denied, 352 U. S. 858.

**C. Since the entry was lawful, the seizure of contraband open to view during the search for petitioner was also lawful**

Since, as we have shown, the entry was lawful, it follows under the statute [16] that the officers had the right to seize or destroy articles open to their view, found while probing for petitioner's hiding place, which were contraband and in which petitioner could have no property right whatsoever.[17]

In this type of situation, where the property seized is clearly contraband and is open to view at the time it is found, the right of the officers to seize does not depend upon the making of a contemporaneous arrest or upon the possession of a valid search warrant. The right to seize arises from the fact that, in a place which they have lawfully entered, the agents see before them property the very possession of which is a crime. Time and again, Congress has declared, both specifically and generally, that the type of property found in petitioner's home cannot lawfully be possessed.[18] Moreover, experienced agents would have

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[16] 26 U. S. C. (Supp. IV) 7321 (any property subject to forfeiture to the United States may be seized by the Secretary or his delegate); 26 U. S. C. (Supp. IV) 5623 (seizing officer may destroy any still or still equipment which it is impracticable to remove); 26 U. S. C. (Supp. IV) 7301 (any property or equipment subject to tax or used to make property subject to tax which is held for the purpose of evading the payment of tax or in fraud of the internal revenue laws is subject to forfeiture and seizure); 26 U. S. C. (Supp. IV) 5691 (any distillery and all its appurtenances on which the special tax is not paid shall be forfeited to the United States).

[17] See 26 U. S. C. (Supp. IV) 7302 (no property rights shall exist in any property intended for use in violating the internal revenue laws).

[18] For the predecessor statutes to those cited above in footnote 16, see 26 U. S. C. (1940 ed.) 2810, 2814, 2833, 3116.

no difficulty in ascertaining at a glance that petitioner's distillery was properly forfeit under the internal revenue laws. The still was found in a house, and by statute these premises could never lawfully be used as the site of a distillery. 26 U. S. C. (Supp. IV) 5171. The building obviously carried no sign reading "registered distillery" as required by 26 U. S. C. (Supp. IV) 5180. Thus, when the agents came into the house seeking to arrest petitioner—a lawful entry—they found before them apparatus which by law was forfeit to the United States, equipment which petitioner did not and could not own.

Duty demanded that the agents take possession of that property. This Court has always recognized that where, in the course of his official duties, an officer has come upon property which is contraband or the instrumentality of a crime, the officer need not close his eyes to it, but can seize the property without a warrant. *Harris* v. *United States*, 331 U. S. 145; *Zap* v. *United States*, 328 U. S. 624; *Steele* v. *United States No. 1*, 267 U. S. 498; see *Adams* v. *New York*, 192 U. S. 585, 598; *Carroll* v. *United States*, 267 U. S. 132, 158. On principle, when measuring whether or not such a seizure is proper, it is not essential that the officer be shown to have come upon the offending property in any particular way—so long as his activity is lawful. He may have come upon the property subject to seizure as part of a lawful search incident to arrest for another crime as in *Harris;* during inspection of corporate books open to government agents by contract as in *Zap;* or while executing a warrant for other property as in *Steele*. It is only necessary, as in this case, that the officers lawfully

come upon the scene where the property subject to seizure is found.[19]

In sum, where entry is lawfully made for some other purpose, and thereafter contraband property is found in open view, it is subject to immediate seizure. That is this case.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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[19] Lower courts have consistently followed the same rule. *Ellison* v. *United States*, 206 F. 2d 476 (C. A. D. C.) (stolen goods seen on defendant's property by officers who were legally on defendant's front porch); *Kelly* v. *United States*, 197 F. 2d 162 (C. A. 5) (a customs official searching for aliens illegally entering the country found non-tax paid liquor); *Love* v. *United States*, *supra*, 170 F. 2d 32, certiorari denied, 336 U. S. 912 (distillery found in defendant's home by officers seeking to arrest one Foster, who was believed to be hiding therein); *Lane* v. *United States*, *supra*, 148 F. 2d 816 (C. A. 5), certiorari denied, 326 U. S. 720 (officers searching for defendant to arrest him found articles used to make non-tax paid liquor in defendant's garage); *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, 570–571 (C. A. 9), certiorari denied, 325 U. S. 877 (sales at illegal prices found while inspecting books required by law to be kept); *Bowles* v. *Ray*, 146 F. 2d 652 (C. A. 9), certiorari denied, 325 U. S. 875 (same); *Bennett* v. *United States*, 145 F. 2d 270 (C. A. 4), certiorari denied, 323 U. S. 788 (search warrant for counterfeiting apparatus justified seizure of counterfeit ration coupons).

## APPENDIX

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Act of March 1, 1879, c. 125, Sec. 9, 20 Stat. 327, 341–342 (18 U. S. C. (1940 ed.) 593, repealed, 62 Stat. 863) provided:

> Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer named in section one thousand and fourteen of the Revised Statutes, who may reside in the county of arrest or if none, in that nearest to the place of arrest, to be dealt with according to the provisions of sections ten hundred and fourteen, ten hundred and fifteen, ten hundred and sixteen of the said Revised Statutes.

The National Prohibition Act of October 28, 1919, c. 85, Title II, Sec. 28, 41 Stat. 316, provided:

> The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

The Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, Sec. 9, 49 Stat. 875, provided:

> The Commissioner, his assistants, agents, and inspectors, and all other officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this title and of Title III of the National Prohibition Act, which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

18 U. S. C. 3053 provides:

> United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

The pertinent provisions of the Internal Revenue Code (26 U. S. C. (Supp. IV)) are:

§ 5313. *Powers and duties of persons enforcing this part.*

(a) *Secretary and other persons.*

The Secretary, his assistants, agents, and inspectors, and all other officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this part or section 5686 which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

* * * * *

§ 5623. *Destruction of distilling apparatus.*

When a judgment of forfeiture, in any case of seizure, is recovered against any distillery used or fit for use in the production of distilled spirits, because no bond has been given, or against any distillery used or fit for use in the production of spirits, having a registered producing capacity of less than 150 gallons a day, for any violation of law, of whatever nature, every still, doubler, worm, worm tub, mash tub, and fermenting tub therein shall be so destroyed as to prevent the use of the same or of any part thereof for the purpose of distilling; and the materials shall be sold as in case of other forfeited property. In case of seizure of a still, doubler, worm, worm tub, mash tub, fermenting tub, or other distilling apparatus, for any offense involving forfeiture of the same, where it shall be impracticable to remove

the same to a place of safe storage from the place where seized, the seizing officer is authorized to destroy the same only so far as to prevent the use thereof, or any part thereof, for the purpose of distilling (except in the case of a registered distillery). Such destruction shall be in the presence of at least one credible witness, and such witness shall unite with the said officer in a duly sworn report of said seizure and destruction, to be made to the Secretary or his delegate, in which report they shall set forth the grounds of the claim of forfeiture, the reasons for such seizure and destruction, their estimate of the fair cash value of the apparatus destroyed, and also of the materials remaining after such destruction, and a statement that, from facts within their own knowledge, they have no doubt whatever that said distilling apparatus was set up for use for distillation, redistillation or recovery of distilled spirits and not registered, or had been used in the unlawful distillation of spirits, and that it was impracticable to remove the same to a place of safe storage. Within 1 year after such destruction the owner of the apparatus so destroyed may make application to the Secretary or his delegate for reimbursement of the value of the same; and, unless it shall be made to appear to the satisfaction of the Secretary or his delegate that said apparatus had been used in the unlawful distillation of spirits, the Secretary or his delegate shall make an allowance to said owner, not exceeding the value of said apparatus, less the value of said materials as estimated in said report; and if the claimant shall there-

upon satisfy the Secretary or his delegate that said unlawful use of the apparatus had been without his consent or knowledge, he shall still be entitled to such compensation, but not otherwise. In case of a wrongful seizure and destruction of property under this section, the owner thereof shall have right of action on the official bond of the officer who occasioned the destruction for all damages caused thereby.

§ 5691. *Penalties and forfeitures for nonpayment of special taxes relating to liquors.*

Any person who shall carry on the business of a brewer, rectifier, wholesale dealer in liquors, retail dealer in liquors, wholesale dealer in beer, retail dealer in beer, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not more than $5,000, and imprisoned not more than 2 years. All distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States.

§ 7301. *Property subject to tax.*

(a) *Taxable articles.*

Any property on which, or for or in respect whereof, any tax is imposed by this title which shall be found in the possession or custody or within the control of any person, for the

purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of such tax, or which is removed, deposited, or concealed, with intent to defraud the United States of such tax or any part thereof, may be seized, and shall be forfeited to the United States.

(b) *Raw materials.*

All property found in the possession of any person intending to manufacture the same into property of a kind subject to tax for the purpose of selling such taxable property in fraud of the internal revenue laws, or with design to evade the payment of such tax, may also be seized and shall be forfeited to the United States.

(c) *Equipment.*

All property whatsoever, in the place or building, or any yard or enclosure, where the property described in subsection (a) or (b) is found, or which is intended to be used in the making of property described in subsection (a), with intent to defraud the United States of tax or any part thereof, on the property described in subsection (a) may also be seized, and shall be forfeited to the United States.

(d) *Packages.*

All property used as a container for, or which shall have contained, property described in subsection (a) or (b) may also be seized, and shall be forfeited to the United States.

(e) *Conveyances.*

Any property (including aircraft, vehicles, vessels, or draft animals) used to transport or

for the deposit or concealment of property described in subsection (a) or (b) may also be seized, and shall be forfeited to the United States.

§ 7302. *Property used in violation of internal revenue laws.*

It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or these hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

§ 7321. *Authority to seize property subject to forfeiture.*

Any property subject to forfeiture to the United States under any provision of this title may be seized by the Secretary or his delegate.

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